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OPINIONS BELOW

The opinion of the District Court is reported in 328 F. Supp. 1140. The opinion of the United States Court of Appeals for the Fifth Circuit (not yet published) is Appendix III to petitioners' Petition for Certiorari on pages A-5 - A-6.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

Does a violation of the Rivers and Harbors Act of 1899 (28 U.S. C. Sec. 407) give rise to a civil action by riparian land owners along a navigable waterway?

STATEMENT

The facts of the case are stated fully in the decisions of the District Court (Petitioner's Appendix III (p. A-7) and the Court of Appeals for the Fifth District (Petitioner's Appendix II, p. A-5).

IN THE

SUPREME COURT OF THE UNITED STATES

T. W. GUTHRIE, ET AL

Petitioners

versus

ALABAMA BY-PRODUCTS COMPANY, ET AL

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF OF RESPONDENT, PEABODY COAL COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REPLY TO PETITION FOR WRIT OF CERTIORARI

I. NO FEDERAL QUESTION IS PRESENTED.

The Petitioners attempt to make an alleged violation of Section 13 of the Refuse Act, 33 U.S.C.A., Section 407, the basis of Federal jurisdiction but have completely misinterpreted the opinion written by the Honorable Sey-

bourn H. Lynne. (Appdx to Petition, p. a-7) This opinion was adopted by the Fifth Circuit Court of Appeals (Appdx. to Petition, p. a-5, a-6)

The Petitioners contend on Page 5 of their Petition that Judge Seybourn H. Lynne of the United States District Court held that Section 13 of the Refuse Act applies only to discharge of refuse that interferes with navigation and not the discharge that merely pollutes.

The Petitioners make the erroneous statement on Page 5 of the Petition that:

> Both lower courts thus have held that Section 13 of the Refuse Act applies only to discharge of refuse that interferes with navigation and not the discharge that merely pollutes."

Even from a casual reading of Judge Lynne's opinion, it is obvious that Judge Lynne assumed for the purpose of his opinion that the various representatives had violated Section 13 of the Refuse Act. On Page a-11 of the Appendix to Petition, the Honorable Seybourn H. Lynne makes the following statement:

> "Assuming, arguendo, that the amended complaint charges violations of 33 U.S.C.A. Section 407, it does not follow that plaintiffs' claim of injuries resulting from conduct which violates 33 U.S.C.A. Section 407 'arises under' that statute in a sense that confers federal court jurisdiction of this action under 28 U.S.C.A. Section 1331."

Judge Seybourn H. Lynne then went on to hold that there was no implied right of action in favor of a private citizen or citizens under Section 13 of the Rivers and Harbors Appropriation Act of 1899 to redress injury to riparian lands resulting from violations of the Act. The holding is best expressed in the following excerpts from the opinion below:

"A careful review of the Rivers and Harbors Appropriation Act of 1899, its legislative history, its administrative interpretation and its judicial gloss has convinced this court that 33 U.S.C.A. Section 407 was not enacted for the purpose or with the effect of creating a federal cause of action to protect riparian landowners from the kinds of water pollution that have traditionally been dealth with under the law of nuisance." (Appdx. to Petition, p. a-13)

"All of this leads the Court to conclude that although Section 407 may create a federally protected right against deposit of refuse which injures navigation or anchorage, the injury of other private rights, even from deposits in violation of Section 407, does not give rise to a federal right of action nor does it supply a basis of federal jurisdiction in this case." (Appdx. to Petition, p. a-19)

The holding below is grounded upon a thorough analysis of the Act, its legislative history and its subsequent administrative and judicial interpretation. These questions lead the courts below to the conclusion that riparian landowners, complaining only of injuries to their right to use and enjoy riparian lands, are not within the class of persons for whose benefit the Refuse Act of 1899 was enacted. (Appdx. to Petition, p. a-13-19)

Judge Lynne drew a very appropriate analogy between 33 U.S.C.A. Section 407 and the Safety Appliance Acts. (45 U.S.C.A. Section 1, et seq. Appdx. to Petition, p. a-19-20)

In this connection Petitioners acknowledge that they must show themselves to be within the class of persons for whose benefit the Refuse Act of 1899 was enacted in order to have the benefit of any such implied right of action. (Petition, p. 15-17) However, in their effort to show that they are within this class, Petitioners cite only decisions which have required an implied right of action under the Refuse Act of 1899 in favor of private parties complaining

of injuries to their *rights of navigation.* (Petition, 18-20) *Petitioners in the case at bar do not complain of such injuries.* (Petition, p. 5)

II. THERE IS NO CONFLICT WITH THE DECISIONS OF THE COURT.

The Petitioners cite the case of *United States versus Standard Oil Company,* 384 U.S. 224 as being in conflict with the case at bar. This case involved the *criminal* prosecution of the Standard Oil Company under Section 13 for allowing gasoline to be discharged into the St. John's River. In that case the Honorable Justice Douglas made the following statement:

> "But the relevant inquiry is not the admittedly important concerns of pollution control, but Congress' purpose in enacting this anti-obstruction Act, and that appears quite plainly to be a desire to halt through the imposition of criminal penalities the depositing of obstructing refuse matter in rivers and harbors."

The Court in no sense held that Section 13 of the Refuse Act would give rise to a civil cause of action of riparian owners.

The Petitioners also cite the case of *Gully vs. 1st National Bank,* 229 U.S. 109 as being in conflict with the case at bar. This case involved a suit against a bank to recover state tax and has no application to the case at bar, although the learned Justice Cardozo did discuss the question of when a claim "arises under" the laws of the United States. The Honorable Seybourn Lynne in the decision below also discussed this question pointing out that something more than mere reference to a federal statute is required and quoted from Justice Cardozo's opinion in *Gully v. 1st National Bank.* (Appdx. to Petition, p. a-11-12)

The Petitioners also cite the case of *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen.* This case

was a suit against a railway company and union for declaratory judgment that the union must represent all members of the craft without discrimination. An effort was made in that case to bring the action in the Federal courts under the Railway Labor Act, 45 U.S.C.A. Section 151, et seq. In holding that the Federal Courts did not have jurisdiction, the Court stated that federal jurisdiction could only be sustained where express provisions of the Act relied on indicate such jurisdiction. The case has no application to the case at bar.

The case of *Steele v. L & N Railroad Company* is also quoted by the Petitioners. This case is reported in 323 U.S. 192. This was an appeal from the Supreme Court of Alabama and was an effort on the part of the Brotherhood of Locomotive Firemen and Enginemen for an injunction against the enforcement of an agreement between the two defendants as to seniority rights of locomotive firemen. It has no application to the question involved in the case at bar.

The case of *Texas & Pacific v. Rigsby*, 241 U.S. 33 is also relied on by the Petitioners. This case involved the application of the Safety Appliance Act and specifically held that the Act was designed for railway employees only and since it designated the group of person for whose special protection and benefit the legislation was enacted, civil liability would be implied. As stated above, Judge Seybourn Lynne drew an analogy between the Safety Appliance Act and Section 13 of the Rivers and Harbors Act and concluded that the Rivers and Harbors Act did not specify any particular class of persons or group of persons for special protection.

The case of *Bell v. Hood*, 327 U.S. 678 is cited by the Petitioners and here again, the Court specifically stated that reliance on federal law as a basis of federal jurisdiction must be direct and not remote and unnecessary.

In the case of *Sierra Club v. Morton,* 31 L.Ed 2d 636 quoted by the Petitioners, this court held that it did not have jurisdiction. This was a suit where a conservation club had sought to enjoin federal officials from granting approval of commercial exploitation of a national game refuge. The action was brought under Section 10 of the Administrative Procedures Act.[1] The case has no application to the case at bar insofar as being an authority for federal jurisdiction.

Petitioners cite the case of *Wyandotte Trans Co. vs. United States,* 389 U.S. 191, as being in conflict with the lower court holding. The *Wyandotte* case involved an action by the United States to recover costs incurred in recovering a wreck negligently sunken in a navigable channel. This court held that the Rivers and Harbors Act of 1899 was obviously intended to prevent obstructions in the nation's waterways. Since no obstruction of waterways is involved in the case at bar, the *Wyandotte* case would have no application.

The last case cited by the Petitioners is that of *J. I. Case Co. v. Borak,* 377 U.S. 426. This was a suit under the Securities Exchange Act of 1934. The subject matter of the suit is so far removed from the factual situation involved in the case at bar that it would be impossible to draw any reasonable analogy.

III. THERE IS NO CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

The holding of the Courts below is entirely consistent with the proposition that *any* deposit or discharge of refuse directly into navigable waters, or their tributaries, is a violation of Section 13 of the Refuse Act of 1899, for which the *Federal government* may prosecute the offender in a criminal action or seek appropriate civil relief. As we have pointed out, the Courts below assumed that such discharges

[1] 5 U.S. C. Sec. 701.

did constitute violations of the Act (Appdx. to Petition, p. a-11) and expressly recognized the United States as the principal beneficiary for which the statute was enacted. (Appdx. to Petition, p. a-14). As such, the United States is entitled to press for criminal sanctions as well as civil relief on account of such discharges.

Thus, it is clear that there is no conflict with decisions of this court under the Refuse Act of 1899 such as *U. S. vs. Standard Oil Co.,* 384 U.S. 224 and *Wyandotte Trans. Co. v. U.S.,* 389 U.S. 191, because both of these were actions by the United States, one a criminal prosecution and one for civil relief. For the same reason, there is no conflict with circuit court decisions under the Refuse Act of 1899, such as *U.S. vs. Ballard Oil Co.,* 195 F.2d 369 (CA2); *U.S. v. Esso Standard Oil Co.,* 375 F.2d 621 (CA3) and *La Merced,* 84 F.2d 444 (CA9), because all of these were criminal prosecutions instituted by the United States.

None of the other decisions of this Court which petitioners suggest are in conflict with the holding below (Petition, p. 6-7) even involve the Refuse Act of 1899. It is obvious that the holding below could not present any substantial conflict with those decisions of this Court.

The only other cases of which we are aware in which *private* citizens have sought to establish federal question jurisdiction under the Refuse Act of 1899 to redress injury to *property rights* caused by water pollution have been decided the same way this case was decided by the Courts below. *H. Christiansen & Sons vs. City of Duluth,* 154 F.2d 205 (8th Cir. 1946) (action for damage to plaintiff's dock caused by timbers washed into navigable waters from defendant's dock); *Chambers-Liberty Counties Nav. Dist. vs. Parker Bros. & Co.,* 263 F. Supp. 602 (S.D. Tex. 1967) (Action for trespass and conversion of shells removed from a jetty owned by plaintiff); *Lavagino v. Porto-Mix Concrete Inc.,* 330 F. Supp. 323 (D.C. Colo. 1971) (action by

riparian landowners not claiming injury to any rights of navigation). In addition, *Hawkinson vs. Blandin Paper Co.* (D.C. Minn., April 14, 1972, 4 ERC 1009), which was an action by riparian landowners for injury to rights of navigation and anchorage, distinguished the foregoing cases where no such relief was sought.

CONCLUSION

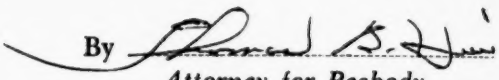
From the foregoing, it is abundantly clear that the "Important Question of Federal Law" suggested by petitioners is not at issue in this case.

The lower federal courts that have confronted cases with essential facts similar to this one have reached the same conclusion — that there is no "federal question" jurisdiction in such cases. Consequently, the body of case law being developed in the lower federal courts has not been inconsistent and certainly is not rendered so by the decision below.

Thus, the petition fails entirely to show any reason why further review in this Court of the harmonious decisions of the two Courts below would be justified.

Respectfully submitted,

HUIE, FERNAMBUCQ & STEWART

By 

Attorney for Peabody Coal Company

OF COUNSEL:
Thomas B. Huie
HUIE, FERNAMBUCQ & STEWART
2014 Sixth Avenue North
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of Respondent, Peabody Coal Company upon opposing counsel by placing a copy of same in the U. S. mail, postage prepaid on this 24th day of July, 1972.

Of Counsel